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The Supreme Court's interpretation of the Alien Tort Claims Act could lead to litigation against U.S. multinationals alleging abusive labor practices at their overseas operations.

The World Gets a Little Smaller; International Employers May Find Themselves Sued in the U.S. for Egregious Overseas Labor Practices

By Kenneth Rose and Scott Wenner

Over the past 25 years, a number of federal courts found that the Alien Tort Claims Act ("ATCA") permitted foreign victims to sue for such violations of international law as summary executions, genocide, war crimes, crimes against humanity and cruel, inhuman, or degrading treatment. Some of those lawsuits were brought against U.S.-headquartered multinational corporations for their alleged involvement in improper and abusive labor practices in developing countries that were said to comprise human rights violations.

In *Sosa v. Alvarez-Machain*, decided June 29, 2004, the United States Supreme Court held that ACTA validly conferred jurisdiction on the U.S. federal courts to hear claims arising in a foreign country. However, apparently rejecting the expansive view of the ACTA urged with some success by international labor and human rights activists (*see, e.g.*, discussion of Unocal case below,) the high court ruled that the scope of the claims authorized by that statute was extremely limited. Congress enacted ATCA in 1789 to give the newly created federal courts jurisdiction over claims brought by aliens for tortious conduct committed in violation of the law of nations or a treaty of the United States. ATCA remained largely unused for 200 years until its resurrection in 1980 when it gained acceptance as a basis for groups to bring lawsuits in the U.S. federal district courts alleging human rights violations occurring in foreign countries.

The ATCA case that caused the greatest concern to multinational companies was *Doe I v. Unocal Corporation*. In the *Unocal* case, peasants from Myanmar (formerly known as Burma) sued under ATCA in California, claiming that the Myanmar military enslaved them to build a natural gas pipeline for a joint venture in which Unocal was a partner. The plaintiffs alleged specifically that they were subjected to murder, rape, and forced labor, and that Unocal had knowledge of these abuses. In September 2002, a three-judge panel of the Court of Appeals for the Ninth Circuit found that the action was properly brought. It ruled that ACTA allows foreigners to sue American corporations in U.S. courts for "aiding and abetting" human-rights violations through "knowing practical assistance, encouragement, or moral support which has a substantial effect on the perpetuation of the crime." The Ninth Circuit agreed to rehear the case before an 11-judge *en banc* panel, but the *en banc* decision has not yet been issued. As the Supreme Court agreed to hear *Sosa* after the *en banc* rehearing of the *Unocal* case was ordered, presumably the Ninth Circuit has been awaiting guidance from the Supreme Court's *Sosa* decision.

Briefly, *Sosa* challenged a scheme by the U.S. Drug Enforcement Agency ("DEA"), using Mexican nationals (including Sosa), to kidnap Dr. Alvarez-Machain in Mexico and bring him to the United States . There he would face prosecution for his purported role in the torture and murder of a DEA agent. Finding that the evidence against Alvarez-Machain was speculative and unreliable, the trial court dismissed the charges against him. After his acquittal, Alvarez-Machain sued Sosa under ACTA. (He also sued the U.S. government under the Federal Tort Claims Act). A jury in Los Angeles awarded Alvarez-Machain $25,000 in damages against Sosa for emotional distress. The Ninth Circuit Court of Appeals upheld the award, and Sosa sought review by the Supreme Court.

Sosa's primary argument was that the passage of ATCA in 1789 did not authorize any federal lawsuits. While the statute granted

jurisdiction only in the federal courts, Congress never passed necessary legislation enumerating those tort actions authorized by the statute. The Supreme Court disagreed. It declared that ATCA permits federal courts to entertain tort claims for violation of the "law of nations", but only those claims that were specifically and definitively recognized when ATCA was passed in 1789. This would arguably limit ATLA actions to claims of "violation of safe conducts, infringement of the rights of ambassadors, and piracy" in the parlance of the day. However, because Congress has not prevented the federal courts from recognizing new causes of action, the *Sosa* opinion added that courts today could recognize new tort claims in cases brought under ATCA. The Court cautioned that the lower federal courts should proceed cautiously down that road, recognizing only those new causes of action that are as well-accepted today as the three tort claims recognized in 1789 were in that era.

Having defined the boundaries of actions properly brought under ACTA, albeit inexactly, the Court found the claim brought against Sosa wanting and reversed the judgment against him. The Court held, without clear explanation, that "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy [under ATCA]."

Now that the Supreme Court has established some guidelines and limits, it will be the task of the lower courts to apply them to individual cases and thus decide what conduct occurring on foreign soil is actionable in U.S. courts under ACTA.

Conclusions

Sosa leaves much to be resolved in the future, on a case-by-case basis. That fact, coupled with the lure of the more expansive damages provided by U.S. federal and state laws and awarded by American juries, may encourage foreign nationals to bring their lawsuits in the U.S. courts and test the newly-articulated limits of ATCA. Global businesses should continue to assume after *Sosa* that they face a risk of liability in U.S. courts for unjustifiable lapses in working conditions abroad. Moreover, that risk may be commensurate to the risk such practices would create if occurring in the U.S.

Sosa provided only slight immediate relief to U.S. multinational corporations. The real impact of that decision cannot be assessed until the trial and appellate courts have had the opportunity to apply its guidance to other actions arising from alleged flagrant abroad.

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